IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH

S.B. ARBITRATION APPLICATION NO.1/07

Amar Quarry Works Private Limited

Versus

State & Ors.

DATE OF ORDER :: 23/11/2007

HON'BLE MR. JUSTICE AJAY RASTOGI

Mr. D.D. Sharma, for applicant

Mr. H.V. Nandwana, Dy.G.A., for respondents

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Instant application has been filed u/s.11 of Arbitration and Conciliation Act, 1996 for appointment of Arbitrator.

Facts giving rise to present application are almost not in dispute. Parties entered into agreement and works contract was assigned to the applicant. Certain dispute arose out of agreement in question which contains clause of arbitration. Relevant Clause 23 of agreement is reproduced as under:

> "Clause 23 : Standing Committee for Settlement of disputes:
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> If any question, difference or objection, whatsoever shall arise in any way, in connection with or arising out of this instrument, or the meaning of operation

of any part thereof, or the rights, duties or liabilities of either party then, save in.so far, as the decision of any such matter, as herein before provided for, and been so decided, every such matter constituting a total claim of Rs.50,000/- or above, whether its decision has been otherwise provided for and whether it has been finally decided accordingly, or whether the contract should be terminated, or has been rightly terminated, and as regards the rights or obligations of the parties, as the result of such termination, shall be referred for decision to the empowered Standing Committee, which would consist of the followings

(i) Administrative Secretary concerned.
(ii) Finance Secretary or his nominee, not below the rank of Deputy Secretary and/or Chief Accounts Officer
(iii) Law Secretary or his nominee, not below the rank of Joint Legal Remembrancer.
(iv) Chief Engineer-cum-Addl. Secretary of the concerned department.
(v) Chief Engineer concerned (Member-Secretary)

The Engineer-in-charge, on receipt of application along with nonrefundable

prescribed fee, (the fee would be two percent of the amount in dispute, not exceeding Rs.one lac) from the Contractor, shall refer the disputes to the committee – within a period of one month from the date of receipt of application.

Procedure and Application for referring cases for settlement by the Standing Committee shall be, as given in Form RPWA 90.”

It is also not in dispute that applicant sent a notice along with prescribed fee as per the said clause which was duly received in the office of respondents, but they failed to make appointment of Arbitrator in terms of Clause 23 of the agreement. Even upto the date of filing application on 18th December, 2006, the matter was not referred for adjudication to the Arbitrator under said clause by the respondents.

Counsel for applicant submits that once the respondents have failed to make appointment of Arbitrator as per clause of agreement in question, Chief Justice or his designated Judge alone holds competence to appoint Arbitrator u/s.11(6) of the Act and in support of his submission, counsel placed reliance on the judgments of this court in **M/s. Singhal**

Construction Company, Bharatpur Vs. State of Rajasthan [2001 (3) WLC-325] and in **Brahma Prakash Vs. State of Rajasthan [2003 WLC UC-256].**

Counsel for respondents has not been able to dispute so far as factual matrix of the matter is concerned, but he submits that even if respondents have failed to make appointment of Arbitrator, this court while making appointment can issue mandamus to appoint Arbitrator as referred to in clause of agreement and none else and in support of his submission, counsel placed on the judgment of apex court in **Ace Pipeline Contracts Pvt. Ltd. Vs. Bharat Petroleum Corporation Ltd. [AIR 2007 SC-1764]** and has given stress basically on paragraphs 13 & 14 of said judgment.

This court has considered the submissions and examined the material on record.

The existence of an arbitration agreement between the parties is essential to make application to the Chief Justice or his designate to appoint an Arbitrator while exercising powers u/s.11 of the Act and despite the applicant sent notice along with prescribed fee duly served in the office of respondents and even upto the date of filing application, respondents have failed to make appointment of Arbitrator under Clause 23 of the agreement. The apex court in **Datar**

Switchgears Ltd. Vs. Tata Finance Ltd. [(2000) 8 SCC-151] observed as under:

> “So far as cases falling under Section 11(6) are concerned -- such as the one before us -- no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6),if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite

party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited."

In view of the judgment of apex court [supra], once the respondents have failed to make appointment of Arbitrator under Clause 23 of agreement within 30 days or till the applicant approaches this court, their right of making appointment of Arbitrator stands forfeited and Chief Justice or his designated Judge alone holds competence to appoint Arbitrator u/s.11(6) of the Act.

So far as the submission made by counsel for respondents is concerned, the court is competent only to make appointment as provided under Clause 23 of the agreement, is without substance and in the light of judgment of apex court [supra] does not hold good.

The judgment [supra] on which counsel for respondents has placed reliance is of no assistance to him for the reason that in the cases referred to considered by the apex court, the Arbitrator as provided under clause was appointed by the respondents much before the applicant approached the court by filing

application and this fact has been specifically referred in Para 20 and infact, the applicant despite Arbitrator being appointed under terms of agreement approached the High Court with a specific request that a retired Hon'ble Judge of Supreme Court be appointed and that request has been turned down by the apex court on the premise that once the parties agreed upon terms and conditions of agreement, no request can be made which runs contrary to the agreement in question.

In the facts and circumstances of the case, I consider it proper to appoint Hon'ble Mr. Justice V.S. Dave [Retd.], Dave Apartments, Block-A, Flat No.101-102, C-22, Sawai Jai Singh Highway, Bani Park, Jaipur as sole Arbitrator to whom the dispute shall be referred. Remuneration of Rs.1,50,000/- & Rs.10,000/- towards expenses [to be equally shared] shall be paid to the sole Arbitrator by the parties.

With the above observations, the application stands disposed of. Copy of this order be sent to Hon'ble Mr. Justice V.S. Dave [Retd.], Dave Apartments, Block-A, Flat No.101-102, C-22, Sawai Jai Singh Highway, Bani Park, Jaipur, Arbitrator forthwith and parties are directed to appear before him on 19th January, 2008 at 4.30 PM.

[AJAY RASTOGI],J.